IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1517

FEDERATED DEPARTMENT STORES, INC., and SAKS & COMPANY,

Petitioners,

v.

MARILYN MOITIE and FLOYD R. BROWN, individually, and on behalf of others similarly situated,

Respondents.

BRIEF FOR RESPONDENTS

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Respondents.

BRIEF FOR RESPONDENTS

QUESTION PRESENTED

Following summary dismissal of his federal claims for lack of standing to sue in federal court, respondent sought a trial of his claims in the California state courts based on purely state-law theories of recovery.

The question presented is whether the district court's dismissal for lack of federal standing is res judicata of respondent's state claims.

STATEMENT OF THE CASE

Respondent Floyd R. Brown filed suit in federal court on behalf of himself and others similarly situated, charging petitioners with conspiring to fix retail prices for women's clothing in Southern California.[1] Brown I was placed with five other federal lawsuits filed by Northern California plaintiffs concerning price-fixing activities in Northern California and assigned to a single judge.[2] Brown I was the only case concerning Southern California anticompetitive practices in retail women's clothing and accessories.

Respondent Marilyn Moitie had filed suit in the California Superior Court for Santa Clara County asserting state-law claims, including fraud and restitution, for petitioners' anticompetitive activities in Northern California; her action was removed to the district court for the Northern District of California and placed with the Weinberg cases and Brown I; however, her action now has been dismissed

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[1] Brown v. Federated Dept. Stores, Inc., et al., No. C-76-1210-SW (Brown I). Following indictment and civil action by the United States for anticompetitive practices in Northern California, both petitioners entered nolo contendere pleas, Federated accepted a consent judgment in the civil action, and Saks secured dismissal of the civil action against it. No indictment was issued covering alleged price-fixing activities in Southern California. Although petitioners' Southern and Northern California retail outlets constitute different operations, they are integrated into petitioners' respective vertical structures; in particular, the pricing practices of the Northern and Southern California operations are integrated.

voluntarily. The dismissal was filed in order to "avoid duplication of effort and expense in the WEST COAST DEPARTMENT STORE ANTITRUST LITIGATION."[3] (J.A. 222.)

Shortly after Brown I was filed, the district court suggested that petitioners move to dismiss all the pending complaints on the ground that retail purchasers are not injured in their "business or property" under the standing requirements for plaintiffs in Section 4 of the Clayton Act, 15 U.S.C. §15 (1976). Petitioners so moved and the various plaintiffs contested the motion. (See, Memorandum in Opposition to Dismiss, J.A. 43-75.) Citing the "proliferation of lawsuits" feared by Congress, the district court noted that the "sole issue" in the motion to dismiss was the meaning of the phrase "business or property." (J.A. 80-81.) The district court then held that the plaintiffs "lack standing to maintain an antitrust action for their injuries" under federal law and that "business or property" in Section 4 is a "conjunctive reference to interests of a business nature." (J.A. 84.) This was despite the clear use of the disjunctive in the phrase. The Weinberg plaintiffs took an appeal.

Brown and Moitie did not appeal the dismissal of their federal claims. Respondent Brown did not amend in order to assert state-law claims, nor did the district court discuss the issue of whether it could

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[2]The five actions are referred to in this brief as the "Weinberg" cases.

[3]Since the Moitie case is moot, it is not discussed at length in this brief.

or would have taken pendent jurisdiction over his state-law claims. The district court, however, was aware of the nature of these potential pendent claims as the Moitie complaint was framed entirely in terms of state-law claims for unfair competition and anticompetitive practices.[4]

Believing that the district court's dismissal did not comprehend his state-law claims, respondent Brown filed a complaint containing only state-law claims in the Municipal Court for the Palo Alto-Mountain View Judicial District (Brown II). (J.A. 93.) The complaint concerned petitioners' anti-competitive activities in Southern California and stated causes for unfair competition, fraud and restitution. It did not allege violations of California antitrust law, the Cartwright Act [Bus. & Prof. C. §§16720, et seq. (West 1978)]. Petitioners removed the case (as well as a companion case for activities in Northern California filed by respondent Moitie) to the same federal court which had previously dismissed Brown's federal complaint. Respondent moved to remand. The district court denied the motion to remand and, instead, granted petitioners' motion to dismiss (J.A. 187-192.)

Respondents Brown and Moitie appealed the adverse ruling of the district court.

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[4]California law granted consumers standing to sue for antitrust injuries. See, for example, Rosack v. Volvo, 1977 C.C.H. Trade Cases, ¶61,395 (Superior Court, San Mateo County), a case out of the same court in which Respondent Moitie first filed her action. Indeed, California law affords consumers still greater protection by expressly granting standing to indirect purchasers and sellers, contrary to the rule laid down for federal antitrust law by

In the meantime, this Court decided Reiter v. Sonotone Corp., 442 U.S. 330 (1979), holding that a consumer may have standing to sue for antitrust violations under Section 4 of the Clayton Act. The Ninth Circuit reversed and remanded the Weinberg cases for a determination consistent with Reiter.[5]

Turning to respondents' appeals, the Court of Appeals noted that the district court's "holding as a matter of law that consumers had no standing to bring these antitrust actions" meant that the "lower court did not reach the merits" of either the Weinberg or respondents' cases. (J.A. 218-219.) Because the "underlying case was successfully appealed, the court reversed the district court's dismissal and remanded respondents' cases to the federal district court. Applying "common sense and simple justice," the court could not in good conscience "deny them their day in court." (J.A. 219.)

In petitioning for rehearing, the department stores invited the court to chastise plaintiffs' counsel, whose re-entry into the proceedings by the court's remand allegedly benefitted only himself, not the consumer who he intended to represent. (J.A. 208.) The Court did not rise to the invitation.

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). Cal. Bus. & Prof. C. §16750(a) (West 1978).

[5]Weinberg v. Federated Dept. Stores, Inc., et al., No. 77-1547 (9th Cir. June 25, 1979) (Order reversing and remanding).

SUMMARY OF ARGUMENT

To quote Justice Rutledge in dissenting from an opinion repeatedly cited by petitioners, "This is a hard case making, I think, proverbially bad law."[6] Respondent had been directed by a court of limited jurisdiction to seek another forum: the federal district court to which he had applied for relief perfunctorily dismissed his complaint for lack of standing to sue under the federal antitrust laws. (J.A. 88.) Turning to the courts of general jurisdiction, respondent filed a complaint alleging theories of recovery based on state law, such as fraud, unfair business practices and restitution, in the courts of the state of California. (J.A. 93.) He did not appeal the federal dismissal; instead, respondent applied to the state to have the trial previously denied him by the federal district court. This Court in the meantime overruled the district court's determination that he had no standing to sue.[7] Yet respondent still awaits his day in court.

Petitioners characterize respondent's actions as a deliberate tactical decision amounting to a dangerous challenge to the administration of justice by the federal courts. They sound a call to arms, urging that this Court put an end once and for all to the disruptive maneuvering exemplified, they claim, by respondent's seeking his remedy in the state courts after being

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[6] Angel v. Bullington, 330 U.S. 183, 201 (1946) (dissenting opinion).

[7] Reiter v. Sonotone Corp., 442 U.S. 330 (1979), rev'g 579 F.2d 1077 (8th Cir. 1978).

turned away by the federal courts. But no matter how strident their exhortations, petitioners cannot make this case into a rallying cry for controlling "breakaway tactics and other machinations" through use of the doctrine of res judicata. Sensitive issues of federalism, the general powers reserved by the state courts beyond the limited grant of authority given the federal courts, prevent it.

The recalcitrance of respondent's predicament to the blunt analysis proposed by petitioners is perhaps best illustrated by the dilemma faced by the Ninth Circuit Court of Appeals in its opinion below. After remanding the Weinberg cases to the district court for a determination consistent with Reiter, the Court of Appeals had to dispose of Moities's and Brown's appeals. It would have been profoundly unjust to tolerate dismissal of their cases while the Weinberg cases were not dismissed. But the court's real dilemma was this: If their cases were not "interwoven" with those of the Weinberg plaintiffs, then Moitie's and Brown's cases should be remanded to the state court for determination of the state claims they filed after the district court's dismissal for lack of federal standing. This result follows directly from principles of federalism long established, and recently affirmed, by this Court. If, on the other hand, their cases were "interwoven" with those of the Weinberg plaintiffs, then Moitie's and Brown's cases logically should benefit from the Weinberg plaintiffs' successful appeal. This result follows from consideration of policies favoring conservation of judicial resources.

Moitie and Brown wanted to return to the state courts to pursue their state claims; the department stores, to avoid

their claims entirely. Finding itself impaled on the horns of the dilemma of whether their cases were "interwoven" with the Weinberg cases, the Court of Appeals opted to please neither party and, instead, make the most efficient disposition possible.[8] Not surprisingly, the court's choice coincided with what it took to be the fairest disposition of the matter, which it characterized as "complex and novel." (J.A. 215.) The court sent Moitie and Brown back to the district court to join the Weinberg plaintiffs.

Oblivious to Professor Moore's warning that "at times there is considerable truth to the observation that res judicata renders white black, the crooked straight," petitioners insist that the only proper and effective solution is to hold that the district court's dismissal for lack of federal standing is res judicata of all respondent's claims, including those framed in terms of state law which respondent brought in Brown II. The obdurateness of their argument is revealed by petitioners' choice of leading cases. Two, Reed v. Allen,

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[8]Petitioners repeatedly note that respondent's charges concern their Southern California operations, not the Northern California operations for which they were indicted and sued by the Weinberg plaintiffs. This is supposedly to show that the Court of Appeals wrongly found respondent's case to be "interwoven" with the Weinberg cases. But had the Court of Appeals found them not "interwoven" and remanded respondent's case to the state courts, petitioners would instead be urging (among other things) that the cases were in fact "interwoven" and should be joined with the Weinberg cases. Such was the extent of the Court of Appeals' dilemma. See, Appendix A, infra.

286 U.S. 191 (1932), and Angel v. Bullington, 33 U.S. 183 (1947), are criticized by Professor Moore as "illustrative of the danger of inflexibility" in applying the doctrine of res judicata.[9] The comments made by Professor Moore in concluding his criticism of these cases bear repetition:

> Inexorable rules inevitably produce some harsh and unjust results. These might well be a proper price to pay for the sound doctrine of res judicata, if the rule can be maintained only by that price. But a modest use of discretion in applying and moulding res judicata to the facts of the case, while observing the sound principle of finality, need not lead to an impairment of res judicata. In fact such an approach may avoid both harsh results and circumventing technical exceptions and lead, on the whole, to a more forthright application of the sound, basic principles of res judicata.
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> Just as res judicata is occasionally qualified by an overriding, competing principle of public policy, so occasionally it needs an equitable tempering. The equity of the rule requires an appropriate equity of application.[10]

Petitioners unduly inflate the Court of Appeals' decision to monumental

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[9] 1B MOORE'S FEDERAL PRACTICE, ¶0.405[12] at 787 (2d ed. 1980).

[10] Id., at 791.

proportions, limited as the decision is to the rather unusual predicament in which respondent finds himself. What is an attempt both to preserve the principle of finality and to avoid harsh, unfair results becomes, in petitioners' words, a "gaping exception" undermining the very ability to ensure sound judicial administration of complex litigation. Such distortion of the case only serves to compound the difficulty of fair and reasonable resolution of respondent's plight occasioned by the district court's improper denial of standing to sue in federal court. Considering this, it would be appropriate to dismiss certiorari as improvidently granted.

Barring such dismissal, however, respondent should be remanded to the state courts for trial of the state claims pleaded by him after being dismissed by the district court for lack of federal standing. Affirming the district court's denial of remand to the state courts and its dismissal for res judicata will most assuredly result in precisely the overcrowding of federal court dockets that this Court seeks to avoid. Such affirmance would subsume state antitrust law under federal law, despite the lack of congressional mandate to accomplish such pre-emption. The effect will be to compel all consumers alleging injury due to anticompetitive practices to file suit in the federal courts, to the exclusion of the state courts. This Court should not encourage such a result.

ARGUMENT

Summary Dismissal for Lack of Federal Standing Is Not Res Judicata of Respondents' State-Law Claims

Respondent initially looked to the federal courts for redress, but was summarily turned out of the district court without a trial of his charges that the defendant department stores had illegally fixed the price of women's clothing in Southern California. The grounds were that, as a consumer, he lacked standing to sue under federal antitrust law. In reliance on accepted formulation of the law by commentators of both federal and California law, respondent determined that if the federal courts were closed to him, he would seek redress in the state courts. In what cannot fairly be disputed was a basic miscarriage of justice and an abuse of federalist principles, respondent in short order found himself removed from the state court to which he had turned with his state law claims, placed in the same court which had previously denied him federal standing and again summarily dismissed without trial, this time on the grounds of res judicata.

Petitioners ultimately justify this curious result by seeking to make an issue of respondent's counsel for his choosing to pursue state law remedies rather than appeal the adverse decision by the trial court. But this ad hominem attack cannot obscure the principal consequence of their argument: upholding the district court's dismissal based on res judicata would severely damage the federalist balance between the limited jurisdictional powers of the federal courts and the general powers of state courts.

A. Well-Established Principles of Federalism Dictate That Respondent's State Claims Are Not Barred by the Federal Court's Prior Dismissal for Lack of Federal Standing.

Petitioners argue that because respondent attempted to relitigate the same cause of action against the department stores "based on the same operative facts" as Brown I, the later action is barred by res judicata. (Brief, pp. 22-23.) This is notwithstanding that respondent framed his second complaint in terms of theories based solely on state law. They argue, however, that the same cause of action cannot be relitigated under a different legal theory, citing RESTATEMENT (SECOND) OF JUDGMENTS, §61.1, Comment d at 159 (Tent. Draft No. 5, 1978).

Petitioners use the phrase "based on the same operative facts," which adverts to the rule in United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966), that state and federal claims must "derive from a common nucleus of operative fact" if the federal court is to have the power to exercise pendent jurisdiction over state claims. In such a case, the exercise of pendent jurisdiction is a matter of the court's discretion; it is not mandatory. Id., at 726.

Although recognizing that it is the same cause which precludes splitting, not the same legal theory or grounds, petitioners exhibit some confusion as to whether Brown II actually states the same theories as Brown I, or merely the same cause. Brown II seeks recovery for an invasion of plaintiff's interest in personalty, as does Brown I. The claim of injury is the same: overpayment

caused by the department stores' unfair and anticompetitive activities. The legal theories or grounds on which the claim is based, however, are patently different: the state law of fraud and unfair competition in Brown II and the federal law of price-fixing in Brown I. (See, J.A. 99-101.)

The district court encouraged this confusion by noting that the state complaint "essentially alleged violation of federal antitrust laws" (J.A. 192), apparently making the unjustified inference that respondent's state-law theories in some unspecified way reduced to the federal theory of price-fixing. Were this inference justified, de facto pre-emption of state law by federal antitrust law would result, which is contrary to the interest of Congress. See, State of California v. California and Hawaiian Sugar Co., 588 F.2d 1270, 1273 (9th Cir. 1978).

Petitioners cite Scoggin v. Schrunk, 552 F.2d 436, 437 (9th Cir. 1975), cert. denied, 423 U.S. 1066 (1976) as applying the rule against splitting to the case of different federal and state theories. In Scoggin, the plaintiff attempted to file an action in federal court under the Civil Rights Act after suffering an adverse judgment on the merits at trial in the state courts based on essentially the same operative facts. Plaintiff urged that because the federal claim was not raised in the state action, the res judicata effect of the state action did not apply to the federal action. But the court held that the federal action was barred because the state judgment on the merits "preclude[s] the assertion of every legal theory or ground for recovery that might have been raised" in the state action. These included the plaintiff's federal claims because the state court had concurrent

jurisdiction over them. Unlike federal courts, state courts are courts of general jurisdiction; thus, the state court in Scoggin had concurrent jurisdiction to enforce federal antitrust law. See, Williams v. Horvath, 16 C.3d. 834,837 (1976).

What petitioners argue in citing Scoggin (and other cases to the same effect) is that since respondent's state-law theories could have been raised in the prior federal action under the court's power to hear pendent state-law claims, the res judicata effect of that action precludes the assertion of the state-law theories in the later action. See, 1B MOORE'S FEDERAL PRACTICE, ¶0.405[1] at 624. As petitioners' note, this argument generally is consistent with the important policy of avoiding piecemeal litigation.

But petitioners' argument ignores the overriding federalist policies underlying what a recent California case calls the "state court-federal court-pendent jurisdiction problem." Mattson v. City of Costa Mesa, 106 C.A.3d 441 [164 Cal. Rptr. 913, 920](1980). At issue herein is actually the converse of Scoggin; viz., the res judicata effect of a federal dismissal for lack of standing to assert federal claims on respondent's subsequent assertion of state claims, which he attempted to litigate in the state courts. Where a plaintiff is summarily turned out of a court of limited jurisdiction, as respondent was in the district court for lack of federal standing, his alternative is clearly to assert non-federal claims in a court of general jurisdiction.

The reasons for allowing such a plaintiff to pursue his remedy in the state courts are especially vital where his

federal claims are dismissed without a trial:

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice. . . Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. . . [T]he state claims may be dismissed without prejudice and left for resolution to state tribunals.[11]

Justice, as well as comity, are best served by allowing a plaintiff who is denied a trial for lack of federal standing to pursue state-law remedies in state court.

B. Since the Federal Court Would Have Declined To Exercise Pendent Jurisdiction Over Respondent's State Claims, Respondent Is Not Precluded From Asserting Them.

Federal courts have generally followed the direction in Gibbs that summary disposition of a federal claim before trial either requires that the federal court refuse to exercise its pendent jurisdiction over non-federal claims or else defeats it entirely. See, 3A MOORE'S FEDERAL PRACTICE, ¶18.07[1-3]. The court in Hodge v. Mountain States Tel. & Tel. Co., 555 F.2d 254, 261 (9th Cir. 1977), reversed summary judgment for defendant on both federal and state claims and held:

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[11] United Mine Workers v. Gibbs, supra, 383 U.S. 715, 726.

> When a district court dismisses all federal claims prior to trial, it should not retain jurisdiction over pendent claims.

A fortiori, where a complaint is dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a district court should not exercise pendent jurisdiction. Tully v. Mott, 540 F.2d 187, 196 (3rd Cir. 1976); Kavit v. A. C. Stamm and Co., 491 F.2d 1176, 1179-1180 (2d Cir. 1974).

> If it appears that the federal claims are subject to dismissal under Fed. R. Civ. P. 12(b)(6). . ., the court should refrain from exercising pendent jurisdiction absent exceptional circumstances. Indeed, this is essential to avoid a result where, as has been happily said, "the dog would be wagged by his tail." Hart & Wechsler, The Federal Courts and the Federal System, 925 (2d. ed. 1973)." [12]

This reasoning applies with particular force to the case where, as here, a plaintiff is denied a federal forum for lack of standing under federal law. As the court stated in Tully v. Mott, supra, 540 F.2d at 196:

> Plaintiffs' lack of standing to sue under Rule 10b-5 was a threshold bar which precluded them from stating in their complaint a cognizable claim for relief under the federal securities laws. . . Since there was no substantial federal claim to which the state

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[12] Kavit v. A. C. Stamm & Co., id.

> claims could be appended, the primary justification for the exercise of pendent jurisdiction was absent.[13]

The parallel between plaintiffs' lack of standing under federal securities laws in Tully and respondent's lack of standing as determined by the district court under Section 4 of the Clayton Act is unmistakable.

It is not mere conjecture to conclude that the district court would have declined to exercise pendent jurisdiction over respondent's state-law claims. The district court found (however misguidedly) that respondent's lack of standing was apparent from the face of his pleadings. Presented with what the court thought were such insubstantial federal claims, it could not properly have exercised pendent jurisdiction. For this reason, petitioners cannot argue that, even though the court mentioned only the federal claims, it somehow "meant" to dismiss the state claims. It did not because it could not properly have dismissed them, given its holding on the issue of federal standing.[14]

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[13] Tully v. Mott, supra, 540 F.2d at 196.

[14] For this reason also, it makes no sense to argue that because the state claims were not expressly preserved "without prejudice," they are barred. There was no opportunity to dismiss the state claims. Even the complaint which contained claims formulated in terms of state law, which was respondent Moitie's, had been removed and hence was considered only as to whether it stated facts sufficient for federal standing.

Similarly, the argument is inappropriate that because respondent's federal-law and state-law actions involved the same "primary right," the state-law action violates the rule against splitting a cause of action. Setting aside what one California court has called the "murky issue" of what is meant by this term, it is clear that respondent's right to pursue his state-law action depends simply on whether the dismissal for lack of standing on the federal claim is res judicata of the state-law claims. See, Merry v. Coast Community College Dist., 97 C.A.3d 214, 227 and n.9 (1979).

Cases holding that a trial in federal court bars a later action in state court on non-federal claims do not weaken the above reasoning.

In Ford Motor Co. v. Superior Court, 35 C.A.3d 676, 680 (1973), the court held that plaintiff "should have sued for both federal and state relief in the earlier federal action." A lengthy jury trial in federal court preceeded judgment for defendants on a Sherman Act claim. Plaintiff later brought an action in the state court under the Cartwright Act. The appellate court found that the federal court would very likely have exercised pendent jurisdiction. Consistent with Gibbs, in which plaintiff also had benefitted from full trial of his federal claim, the trial in Ford demonstrated the substantiality of the federal claim, thus properly grounding the federal court's exercise of pendent jurisdiction over the state claims. No such demonstration of the substantiality of respondent's federal claim ever occurred; in fact, it was dismissed summarily.

The Restatement (Second) of Judgments, Fifth Tentative Draft, adopts the rule that

a federal court judgment does not preclude the subsequent assertion of state law claims where it is clear the federal court would have refrained from exercising pendent jurisdiction over the state claims. Comment "e" of Section 61.1, at page 160, states:

> A given claim may find support in theories or grounds arising from both state and federal law. When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground. If however, the court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would clearly have declined to exercise it as a matter of discretion), then a second action in a competent court presenting the omitted theory or ground should be held not precluded.

Illustration 10 under Comment "e" states:

> A commences an action against B in a federal court for treble damages under the federal antitrust laws. After trial, judgment is entered for the defendant. A then seeks to commence an action for damages against B in a state court under the state antitrust law grounded upon substantially the same business dealings as had been alleged in the federal action.

> Even if diversity of citizenship between the parties did not exist, the federal court would have had 'pendent' jurisdiction to entertain the state theory. Therefore unless it is clear that the federal court would have declined as a matter of discretion to exercise that jurisdiction (for example, because the federal claim, though substantial, was dismissed in advance of trial), the state action is barred.

The reporter's notes to illustration 10 explains at page 179:

> If in a given case it is clear that a federal court, applying the criteria elaborated in Gibbs, would not have entertained the state theory, the state action should not be barred.

Where plaintiff has had no trial of his federal antitrust claims, but is instead dismissed for lack of standing under federal antitrust law, it is indeed clear that under the Gibbs criteria, the federal court would not have entertained the state claims. Hence, the state action should not be barred.

C. Angel v. Bullington and Reed v. Allen Cannot Properly Be Applied to Preclude Assertion of Respondent's State Claims.

Petitioners support their claim that Brown I (federal theories) was res judicata of Brown II (state theories) by collapsing two distinct doctrines. The result is a confusion which, if perpetuated, could upset the delicate balance between limited federal court and general state court jurisdiction that this Court has long strived to achieve.

Both doctrines are employed in the leading case Angel v. Bullington, 330 U.S. 183 (1947). The case first arose in the state courts of North Carolina, where Bullington, a citizen of Virginia, sued for a deficiency judgment on a purchase-money deed of trust. The State Supreme Court held that North Carolina's anti-deficiency legislation denied the state courts jurisdiction to grant the relief sought. Without appealing to this Court, Bullington brought an action in the federal district court in North Carolina seeking the same relief. The district court gave judgment for Bullington and the Court of Appeals affirmed. This Court granted certiorari, then reversed on the grounds that the North Carolina judgment was res judicata of any federal action in federal courts sitting in that state.[15]

Consistent with its holding that the North Carolina judgment was "on the merits"

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[15] See 1B MOORE'S FEDERAL PRACTICE, ¶0.409[2] at 1018-1019 (2d. ed. 1980). The Court did not hold that the state judgment should be given full faith and credit in the federal courts. The state judgment was based on state procedural law, but the court held that for the purposes of Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), the state anti-deficiency law was substantive, not procedural; thus, the state judgment was "on the merits" for federal courts sitting in North Carolina in diversity cases. In federal courts sitting in other states, the judgment would not be "on the merits" but a judgment on jurisdiction only. Strong dissents were issued criticizing the incoherence of the majority opinion in this issue.

for federal courts sitting in that state, the Court found that "claims based on the United States Constitution" were raised by the state action, even though the basis of the judgment was the state anti-deficiency statute.[16] Like the Scoggin case discussed above, the state court had concurrent jurisdiction over the federal claims raised by the plaintiff. The plaintiff has not appealed the state court's ruling on the federal claims. Applying this reasoning, the Court held that the state action was res judicata of the subsequent federal action in the district court sitting in North Carolina.[17]

Under this reasoning, of course, respondent is not precluded from bringing his state claims before the California state courts. The federal court below in Brown I would not have exercised pendent jurisdiction over the state claims; consequently, these claims may be adjudicated by a court of general jurisdiction.

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[16] Angel v. Bullington, supra, 330 U.S. at 188-189. Compare, Bell v. Hood, 327 U.S. 678, 682 (1945); and see, Mishkin, "The Federal 'Question' in the District Courts," 53 Col. L. Rev. 157, 166-67(1953).

[17] The statement in the text avoids bringing the issue of applicable law under Erie, which the majority opinion imports into its analysis of the res judicata issue. Perhaps this is the source of the majority's confusing discussion of whether the federal claim was denied "on the merits" for the purposes of res judicata; namely, whether the federal claim was denied enforcement on the basis of a professed local ground, which local ground in fact constituted the adjudication of a federal question (presumably, the federal question whether a federal court having diversity jurisdiction and sitting in North Carolina could give

a deficiency judgment). Perhaps also this confusion blinded the majority to what Professor Moore described as the "novel" and "harsh" application of res judicata in the case. Professor Moore observes that holding that the North Carolina judgment was "on the merits" was "to make black that which is white and crooked that which is straight." 1B MOORE'S FEDERAL PRACTICE, ¶0.409[2] at 1018.

In noting the incoherence of the majority's discussion of whether the "merits" had been decided, Justice Rutledge properly focused upon whether the litigant had been accorded at least one full and fair opportunity to have his substantive rights decided. In his dissent beginning 330 U.S. at 201, he stated:

> On the surface what seems to be decided is simply a question of res judicata. Actually the decision rests on an "and/or" hodgepodge of res judicata and Erie doctrines. In my judgment the admixture not only is unnecessary but distorts and misapplies both doctrines.
>
> * * *
>
> Res judicata is a generally sound but by no means unlimited policy of judicial action . . . The sound core of the policy is that ordinarily one suit which determines or gives a full and fair chance for determining causes of action and issues between litigants should be enough and when this much has been given further opportunity should be denied. Stated so simply, however, the doctrine would be as much trap for the unwary as boon for the wise or lucky litigant. Exceptions and qualifications are so numerous as to make the field not only technical but treacherous, this case being a nice illustration.

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* * *

> [I]f the "'merits' in the sense of the ultimate substantive issues of a litigation" are not reached, their later determination is not foreclosed. This is true whether or not the jurisdictional ruling is erroneous or valid and whether or not if erroneous it might have been corrected on appeal. That law is sound . . . It is grounded in the policy that unless a litigant gets a real bite at the apple of discord he should not be foreclosed from another attempt. Its basis is that in such a case it is better and more just not to stop litigation than it is to stop the showing of the truth and thereby bring about a forfeiture of valuable and substantive rights without giving at least one full and fair, which means fairly certain, opportunity for securing decision upon them.

Justice Rutledge's warning that the salutary doctrine of res judicata should not be used as a "trap for the unwary" litigant is well suited to the case at bar. This Court is being asked to sanction the forfeiture of respondent's substantive rights. The proposed justification is that the district court's dismissal for lack of federal antitrust standing, subsequently overruled, was "on the merits" as to any further action, whether based on federal or state law. The purported justification offends the basic sense of justice that underlies even the doctrine of res judicata. Such a harsh application of the doctrine cannot be permitted.

The second doctrine holds that whether a prior adjudication is erroneous does not affect the application of res judicata. In the Angel case, the majority opinion cited Baltimore Steamship Co. v. Phillips, 274 U.S. 316, 325 (1926) to support its finding that the federal questions adjudicated by the North Carolina Supreme Court, which may have been erroneous, nonetheless precluded the second action in the district court.[18] A rule to the contrary would permit collateral attack of judgments long after a matter had been supposedly laid to rest; this is so whether or not the judgment had been appealed to the highest possible court.

In the Baltimore Steamship case, the Maryland district court, after a trial, held that under maritime law plaintiff's accident was not due to the steamship's negligence, but to other causes. Plaintiff brought a subsequent action in the state courts of New York again alleging negligence. The action was removed to the district court for the Eastern District of New York, where a trial resulted in a verdict for the plaintiff. This Court held in reversing the verdict on grounds of res judicata that both the first and second actions "were prosecuted under the maritime law, and every ground of recovery, open to respondent in the second case, was equally open to him in the first."[19] The fact that in the first case the court evidently proceeded upon an erroneous theory of admiralty law could not be attacked collaterally by the subsequent action.

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[18] Id., at 187. On this issue the dissenters agreed with the majority. E.g., id., at 193.

[19] Id., at 324.

Under this reasoning, respondent could not attempt to collaterally attack the prior judgment of lack of federal standing by bringing his state action. But that is not the effect of respondent's attempting to bring his state claims after the dismissal of his federal claims. The federal dismissal left him free to bring his state claims because the state claims were not before the federal court in the first action. The federal court did not decide, nor would it have decided, respondent's state claims.

A particular application of the second doctrine is that pendency of an appeal does not suspend the conclusive effect of a judgment. One result is the rule in Reed v. Allen, 286 U.S. 191 (1932). After winning a ruling from a trial court that certain property belonged to him under a will rather than B, A sued B in ejectment. Although B had appealed the trial court's decision regarding the will, the second court granted A judgment for the land. The trial court rejected B's contention that the decree regarding the will could not have a conclusive effect pending appeal. In this the trial court appears to have been on solid ground. B did not appeal the second judgment. When the appellate court reversed the first trial court, B then sued A in ejectment, citing the reversal. This Court held that the judgment in the prior ejectment action (although reversed) precluded B's second ejectment action, on the grounds that B could not collaterally attack the earlier, valid judgment.

Reed is properly distinguished on the ground that the judgment denying federal standing in Brown I is not res judicata of the state claims asserted in Brown II. In Reed, on the other hand, the prior ejectment action completely precluded the later one.

Ackermann v. United States, 340 U.S. 193 (1950), follows the rule in Reed and is accordingly distinguished for the same reason.

Apparently believing that the majority's decision in Reed left B remediless, Justice Cardozo attacked the premise in the opinion that B had "one remedy, and one only, an appeal" from the judgment granting A the land. [20] Arguing that restitution of the property to B was the proper approach, not the harsh approach of the majority, Justice Cardozo concluded,

> A system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity. By the judgment about to be rendered, the respondent, caught in a mesh of procedural complexities, is told that there was only one way out of them, and this a way he failed to follow. Because of that ommission he is to be left ensnared in the web, the processes of law, so it is said, being impotent to set him free. I think the paths to justice are not so few and narrow.[21]

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[20] Id., at 207.

[21] Id., at 209-210. Professor Moore suggests that B retained the right to directly attack the judgment by a motion to reconsider under Fed. R. Civ. P. 60(b) or its correlate in the forum that rendered the judgment. 1B MOORE'S FEDERAL PRACTICE, ¶0.405[12] at 788. As Professor Moore recognizes, whether the existence of this alternative in any way mutes Justice Cardozo's criticism is unlikely. See, id., ¶0.416[4] at 2272.

Evidently the Ninth Circuit Court of Appeals reached a similar conclusion when it stated,

> Such a technical application of the doctrine [of res judicata] ignores the obvious fact that the decision in Moitie I, if not the judgment as to these two appellants, has been reversed. Such technical application of procedural rules defeats our real purpose, which is to do justice. (J.A. 218.)

The decision by the Court of Appeals was a compromise. Appellants were denied the relief they actually sought, which was reversal of the trial court's denial of their motion to remand (as well as the dismissal). Contrary to petitioners' indignant charge that respondent seeks to be the "windfall beneficiary" of the Weinberg reversal, what respondent has sought and still seeks is to return to the state forum to which he turned after the federal court denied him standing to sue under federal law. It appears the Court of Appeals thought that, with the Weinberg plaintiffs already back in the district court, sending respondent to join them would be a less bitter pill for petitioners to swallow. The Court of Appeals' only alternative was to send respondent to the state courts as he requested. It could not affirm the dismissal as petitioners urged without violating the federalist principles discussed above.

In fact, the Court of Appeals had good reason to suppose that petitioners would not be too sharply displeased with having respondent join the Weinberg plaintiffs. Petitioners themselves have pressed this Court to take note of a case currently on appeal before the First District Court of

Appeal, State of California, in which the selfsame respondent's counsel, instead of appealing a dismissal for lack of standing for indirect sellers under the federal rule laid down by this Court in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), filed an action in the state courts based solely on state law.[22] It is noteworthy that the defendants therein, through their attorneys of record, including petitioners' lawfirm (Arnold & Porter), have proposed to the District Court of Appeal that the appellants' action be transferred to the federal court after the Fifth Circuit Court of Appeals reversed its dismissal for lack of federal standing.[23] An unprecedented letter to the District Court of Appeal states that dismissing the appeal and transferring the case to the federal district court would be a fair compromise and in the opinion of their attorneys, would not prejudice the defendants. The letter states:

> Because proceedings are again underway in the counterpart cases in Dallas, respondents would not be substantially burdened if the Boccardo plaintiffs were to choose to return to that court in order to reassert their Federal antitrust claims concurrently with the other Federal plaintiffs. Accordingly,

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[22] Boccardo v. Safeway Stores, Inc., No. 1 Civ. 47500 (Ct. App. Mar. 2, 1979). Petitioners note the case at page 40, note 35 and reproduced the trial court's dismissal of the state action in their supplement to the appendix.

[23] In re Beef Litigation, 607 F.2d 167 (5th Cir. 1979), cert. denied, sub nom Safeway Stores, Inc. v. Lowe, Oct. 14, 1980.

> I am authorized to represent on behalf of all respondents that no objection will be interposed by respondents if this appeal is now voluntarily dismissed and the Boccardo plaintiffs thereafter reinstate their Federal case in the Dallas Federal Court.

Recognizing that "only a hypertechnical application of a judicially-created doctrine would deny them their day in court," the Ninth Circuit Court of Appeals adopted the same plain reasoning as the authors of the above letter (which authors ironically include petitioners' lawfirm, Arnold and Porter). With the overruling of the district court's denial of respondent's standing to sue, and the reinstitution of related cases in the Norther California district court, petitioners simply are not "substantially burdened" by respondent's joining the other cases in federal court.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be dismissed as improvidently granted. In the alternative, the district court's dismissal on grounds of res judicata should be reversed, and the district court directed to grant respondent's motion to remand to the California state court.

Respectfully submitted,

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February 17, 1981.

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December 11, 1980

James F. Boccardo, et al. v.
Safeway Stores, Inc., et al.,
1 Civil No. 47500

Mr. Clifford C. Porter, Clerk
Court of Appeal, First Appellate
District, Division 4
350 McAllister Street
San Francisco, CA 94102

Dear Sir:

I am writing on behalf of the respondents in James F. Boccardo, et al. v. Safeway Stores, Inc., et al., 1 Civil 47500. The purpose of this letter is to advise the Court of recent relevant developments in the Federal forum where this matter had its origins, and to inform the Court of respondents' position with respect to these developments. I would appreciate it if you would direct this letter to the attention of the Court.

In the Brief of Respondents filed on February 1, 1980, we explained that in 1976 the Boccardo plaintiffs filed an antitrust complaint in Federal district court. The complaint was consolidated in Dallas with a number of similar complaints.

In 1977 the Boccardo complaint, together with others like it, was dismissed with prejudice for failure to state a claim on which relief could be granted.

APPENDIX "A"

Although all of the other plaintiffs appealed the dismissal to the Court of Appeals for the Fifth Circuit, the Boccardo plaintiffs elected not to appeal and the judgment of dismissal became final as to them.

Instead of appealing the Federal dismissal, the Boccardo plaintiffs filed a new action in the San Francisco Superior Court. The new complaint was in all material respects identical to Boccardo's dismissed Federal complaint; the new complaint alleged the same transactions, wrongful conduct, resulting injury, and primary right. The only difference was that the state complaint alleged the new legal theory that defendants' conduct violated California antitrust laws instead of Federal antitrust laws.

On demurrer the Superior Court held that the Boccardo plaintiffs could not split their cause of action and that, because plaintiffs were required to advance all of their theories of recovery in the earlier Federal action, dismissal of Boccardo's Federal complaint was res judicata.

In our February brief we informed the Court that a panel of the Court of Appeals for the Fifth Circuit had recently reversed the Federal district court's dismissals as to the parties other than the Boccardo plaintiffs and that rehearing en banc had been requested (Br. of Resps., p. 5).

This letter is to advise that rehearing en banc and petitions for certiorari were thereafter denied. On October 20, 1980 the mandate of the Fifth Circuit issued and the Federal cases were remanded to the Federal district court in Dallas for further proceedings. These proceedings have now begun; the Federal district court held a pretrial conference on December 4, 1980 and discovery will soon be underway in the forum from which the Boccardo plaintiffs earlier withdrew.

Because proceedings are again underway in the counterpart cases in Dallas, respondents would not be substantially burdened if the Boccardo plaintiffs were to choose to return to that court in order to reassert their Federal antitrust claims concurrently with the other Federal plaintiffs. Accordingly, I am authorized to

represent on behalf of all respondents that no objection will be interposed by respondents if this appeal is now voluntarily dismissed and the Boccardo plaintiffs thereafter reinstitute their Federal case in the Dallas Federal court. (If the Boccardo plaintiffs return to Dallas, respondents will of course assert all other defenses available to them.)

Dismissal of this appeal, and reassertion of plaintiffs' Federal claims in the Federal district court which is now in the process of conducting pretrial proceedings in a score of similar cases, would avoid unnecessarily consuming the energies of this Court, it would promote the most efficient use of judicial resources, and it would accommodate the legitimate interests of all parties.

Respectfully submitted,

Richard W. Odgers
On behalf of all respondents

cc: Jerrold N. Offstein, Esq.

FEDERATED DEPARTMENT STORES, INC., and SAKS & COMPANY,

Petitioners,

v.

MARILYN MOITIE and FLOYD R. BROWN, individually, and on behalf of others similarly situated,

Respondents.

AFFIDAVIT OF COMPLIANCE WITH RULE 28.2 (Service of Brief by Mail)

STATE OF CALIFORNIA)
COUNTY OF SAN FRANCISCO)

I, JERROLD N. OFFSTEIN, being first duly sworn, declare under penalty of perjury as follows:

1. I am a member in good standing of the bar of this Court, and make this affidavit in compliance with this Court's Rule 28.2 respecting proof of service of Respondent's within BRIEF FOR RESPONDENTS.

2. On February 17, 1981, I accomplished service of said Brief on the Clerk, United States Supreme Court and on counsel

for all parties by placing same, first class mail, postage prepaid, in the United States mail at San Francisco, California.

3. The parties served are:

Bernard, Persky, Solinger & Gordon
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JERROLD N. OFFSTEIN
Attorney for Respondent

Sworn to and subscribed before me this 17th day of February, 1981.

NOTARY PUBLIC
My Commission Expires:
1-25-85